MHS
Panama City, FL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BROWN & ROOT POWER AND MANUFACTURING INC., A SUBSIDIARY of BROWN & ROOT, INC.

and Case 29-CA-028815

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRONSHIP BUILDERS, BLACKSMITHS, FORGES AND HELPERS, AFL-CIO

and Case 29-CA-028814

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 229

ORDER DENYING RENEWED MOTION FOR RECONSIDERATION[1]

For the reasons stated below, we deny the Charging Parties' Renewed Motion for Reconsideration. Given the complexity of the proceedings in this case, we set out the procedural history in detail before turning to the merits of the present motion.

I. Procedural History

On September 28, 2007, the Board issued a Supplemental Decision and Order in this proceeding,[2] in which it held that the Respondent violated the Act by refusing to hire or consider

[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] On August 13, 1996, Administrative Law Judge J. Pargen Robertson issued his decision in this proceeding. The Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party Boilermakers filed cross-exceptions and supporting briefs. On June 7, 2000, the Board remanded the proceeding to the judge for consideration in light of the Board's decision in *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). The judge issued a supplemental

for hire 56 job applicants, owing to antiunion animus. See *Brown & Root Power & Mfg*., 351 NLRB 168 (2007). The Board directed, in relevant part, that the evidentiary standards set forth in *Oil Capitol Sheet Metal*, 349 NLRB 1348 (2007), be applied at the compliance stage in determining issues related to instatement and the duration of the backpay period. See id. at 172.

The General Counsel and Charging Party Union, International Brotherhood of Boilermakers ("Charging Party IBB"), filed timely motions for reconsideration regarding the application of *Oil Capitol*. Specifically, the General Counsel argued that the retroactive application of *Oil Capitol* would cause a manifest injustice because the parties had relied to their detriment on the former rule of *Dean General Contractors*, 285 NLRB 573 (1987), and that, given the passage of time, it might be impossible to establish the elements of *Oil Capitol*. The General Counsel also argued that retroactive application of *Oil Capitol* would further delay remedying the Respondent's unfair labor practices. Charging Party IBB argued that *Oil Capitol* was wrongly decided and, in any event, should not be retroactively applied. Charging Party IBB also argued that it had not been established that the discriminatees were "salts" and that the Board's 2000 remand order to the judge established *Dean General* as the law of the case. On August 29, 2008, in an unpublished decision, a two-member Board analyzed these arguments and denied the motions, finding that they did not present any extraordinary circumstances warranting reconsideration.[3]

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decision on May 10, 2001. Thereafter, the General Counsel, Charging Party Boilermakers, and the Respondent filed exceptions and supporting briefs.

[3] Then-Member Liebman noted her dissent in *Oil Capitol*, but concurred in the denial of the motions for institutional reasons. In doing so, she noted that while claims of manifest injustice resulting from retroactive application of a new legal rule should be considered on a case-by-case basis, denying the motions avoided delay in the disposition of the case, including the completion of the compliance proceeding. Member Liebman further stated her view that if retroactive application of *Oil Capitol* "had a demonstrably adverse effect on the backpay award in this case, the General Counsel or the Charging Party would be free to pursue the manifest injustice issue."

On May 20, 2010, the Second Circuit denied Charging Party IBB's petition for review of the Board's 2007 *Brown & Root* decision. See *International Brotherhood of Boilermakers v. NLRB*, 377 Fed.Appx. 125 (2d Cir. 2010). In so doing, the court, relying on a decision by the D.C. Circuit in the direct appeal of the Board's *Oil Capitol* decision, found that Charging Party IBB's challenge to the application of *Oil Capitol* in this proceeding was not ripe because the case had not yet gone to compliance. See id. at 127, citing *Sheet Metal Workers International Association, Local 270, AFL-CIO v. NLRB*, 561 F.3d 497 (D.C. Cir. 2009). The court therefore dismissed the petition without prejudice to the ability of Charging Party IBB to renew its arguments concerning *Oil Capitol* after the compliance proceedings had been conducted. See id. at 128, 129.

On May 25, 2010, Charging Party IBB filed with the Board a "Motion for Briefing and/or Consolidation or in the Alternative Stay in the Above-Referenced Case," requesting that the Board take the case for further briefing and to consider whether *Oil Capitol* should be overturned or, alternatively, to stay compliance proceedings pending a decision on cases raising the *Oil Capitol* issue. On June 17, 2010, the Supreme Court issued its decision in *New Process Steel v. NLRB*, 560 U.S. 674 (2010), finding that two-member Board lacked a proper quorum. Also on June 17, Charging Party IBB filed with the Board a document entitled "Supplemental Authority in Support of Motion for Briefing and/or Consolidation or in the Alternative Stay," arguing that under *New Process*, supra, the Board lacked a proper quorum when it denied Charging Party IBB's Motion for Reconsideration on August 29, 2008, and that the then-current Board, with a proper quorum, should consider Charging Party IBB's previously filed motion for reconsideration.

On June 23, 2011, in an unpublished Supplemental Order, a properly constituted three-member panel of the Board denied Charging Party IBB's May 25, 2010 motion in its entirety. In addition, the Board, citing *The Lorge School*, 355 NLRB 558 (2010), and applying the principles of res judicata, denied Charging Party IBB's request that the Board reconsider its August 29, 2008 Order denying the General Counsel's and Charging Party IBB's motions for reconsideration.

On February 27, 2013, the Region issued an Amended Compliance Specification and Notice of Hearing, which the Respondent answered on May 6, 2013. On October 25, 2013, the Respondent filed a petition for review with the D.C. Circuit, challenging the Board's underlying 2007 *Brown & Root* decision to the extent it found that the Respondent violated the Act and ordered remedial action and other relief.[4] The D.C. Circuit placed the case into abeyance pending the outcome of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

II. The Present Motion

On November 25, 2013, Charging Party IBB and Charging Party United Association of Journeymen and Apprentices of the United States and Canada, Local Union No. 366 (collectively, the "Charging Parties") filed the present "Renewed Motion for Reconsideration," along with a brief in support of this motion, requesting that the Board reconsider its 2007 *Brown & Root* decision, reported at 351 NLRB 168.[5] The Respondent filed an opposing brief. In their

[4] The petition for review states that, in the event the court finds that the Respondent violated the Act, the Respondent does not challenge the Board's decision that the backpay period for any salt, who is determined at compliance to be entitled to instatement and/or a make-whole remedy, shall be determined in accordance with *Oil Capitol*.

[5] Charging Party United Association of Journeymen and Apprentices of the United States and Canada, Local Union No. 366 did not submit a motion for reconsideration following the issuance of the Board's 2007 *Brown & Root* decision, but on brief in the instant renewed motion "adopts

motion, the Charging Parties assert that because the 2007 *Brown & Root* decision is over 6 years old, the D.C. Circuit lacks the Board's current interpretation of the Act when considering the Respondent's October 25, 2013 petition for review. They also maintain that the confirmation of the five-member Board supports renewed reconsideration.

We find the Charging Parties' "Renewed Motion for Reconsideration" to be untimely. Motions for reconsideration must be filed within 28 days of the Board's decision or order under Section 102.48(d)(2) of the Board's Rules and Regulations. Here, the Charging Parties filed the renewed motion over 6 years after the Board's underlying 2007 *Brown & Root* decision and over 2 years after the Board issued its last order in this proceeding on June 23, 2011. Although the Charging Parties appear to contend that the present motion is timely because Charging Party IBB's original motion for reconsideration was timely filed, we reject this contention. We also reject the Charging Parties' request that the Board exercise its discretion under Section 102.48(d)(2) to extend the filing period. The Charging Parties maintain that exercise of such discretion is justified because in light of *New Process Steel*, supra, the two-member Board's August 29, 2008 Order denying Charging Party IBB's original motion for reconsideration was invalid. However, this argument inexplicably ignores the Board's June 23, 2011 Supplemental Order, issued by a properly constituted three-member panel, which effectively resolved all motions pending before the Board in this proceeding.[6]

Even assuming the Charging Parties' renewed motion is timely, they have not identified any material error or demonstrated extraordinary circumstances warranting reconsideration under

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the IBB's Motion for Reconsideration, filed November 16, 2007, as its own." The General Counsel has not filed another motion for reconsideration.

[6] Although Charging Party IBB's document was styled as a "Motion for Briefing and/or Consolidation or in the Alternative Stay in the Above-Referenced Case," it was, in substance, a request for reconsideration.

Section 102.48(d)(1) of the Board's Rules and Regulations. The Charging Parties cite no Board precedent to support their assertion that a supposed need to provide an appeals court with a restatement of the law constitutes an extraordinary circumstance warranting reconsideration. Nor does the confirmation of a full complement of Board members warrant the reconsideration sought here. See *Visiting Nurse Health System*, 338 NLRB 1074 (2003) (changes in the composition of the Board after the issuance of a decision is an inappropriate ground for reconsideration).

Accordingly, having duly considered the matter, the Board finds that the Charging Parties have not raised any extraordinary circumstances warranting reconsideration of the Board's decision under Section 102.48(d)(1) of the Board's Rules and Regulations.

IT IS ORDERED, therefore, that the Charging Parties' renewed motion for reconsideration is denied.

Dated, Washington, D.C., August 29, 2014

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Philip A. Miscimarra, Member

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Kent Y. Hirozawa, Member

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Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD